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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE

FACEBOOK, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 08-5780 JW (JCS)
	)	
POWER VENTURES, INC.,	)	
	)	San Francisco, California
Defendant.	)	Friday
	)	February 24, 2012
	)	9:30 a.m.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**For Plaintiff:** Orrick, Herrington & Sutcliffe  
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Menlo Park, California 94025  
**BY: MORVARID METANAT, ESQ.**  
**MONTE COOPER ESQ.**

**For Defendant:** Bursor & Fisher, P.A.  
1900 North California Boulevard  
Suite 940  
Walnut Creek, California 94596  
**BY: LAWRENCE TIMOTHY FISHER, ESQ.**  
- appeared telephonically

**Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR**  
*Official Reporter - US District Court*  
*Computerized Transcription By Eclipse*

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P R O C E E D I N G S

**FEBRUARY 24, 2012**

**1:36 p.m.**

**THE CLERK:** Case C08-5780, Facebook versus Power Ventures.

And, Mr. Fisher, since you're appearing by phone, I do have a court reporter who is here. Her name is Debbie Pas. So just make sure you speak up so she can get whatever your conversation is accurately on the transcript, okay?

**MR. FISHER:** I will do that.

**THE COURT:** Thank you.

Counsel, appearances, please?

**MS. METANAT:** Good morning, your Honor.

**MR. FISHER:** Good morning, your Honor. Timothy Fisher for defendants Power Ventures and Steven Vachani.

**MS. METANAT:** Morvarid Metanat and my co-counsel Monte Cooper for Facebook.

**THE COURT:** Thank you, everyone.

So I want to go through these one by one. As to the motion to preclude witnesses at trial, that one seems to me to be moot, isn't it?

**MS. METANAT:** Your Honor, while the issue of Power's liability has been decided on summary judgment, there are still the issues of damages and the issue of Mr. Vachani's personal liability pending before the Court. We ask then that the

1 witnesses be precluded from testifying to those matters given  
2 that we haven't had the ability to depose them.

3 **THE COURT:** I see. So, I guess the question really  
4 was for the defendants as well.

5 You're not intending to call -- and I think you've  
6 said as much. There's three witnesses identified, right?  
7 Santos, Herrera -- and who is the other one?

8 **MR. FISHER:** Carvalho.

9 **MS. METANAT:** Carvalho.

10 **THE COURT:** Carvalho. You're not intending to call  
11 them or submit declarations on their behalfs in this litigation  
12 period, right?

13 **MR. FISHER:** No, your Honor.

14 **THE COURT:** And so do you have any objection to the  
15 Court entering an order saying you can't do that?

16 **MR. FISHER:** No, your Honor.

17 **THE COURT:** Okay. So the first part is a stipulated  
18 order that the defendant shall -- agrees shall not call as  
19 witnesses or provide a declaration from Santos, Herrera and  
20 Carvalho.

21 Okay. The second issue is the motion to compel  
22 emails that were responsive, but purportedly not produced  
23 because they weren't copied to Vachani. Though -- and to  
24 provide a 30(b)6 -- continued 30(b)6 deposition with regard to  
25 those additional emails.

1 Obviously, I have two or three tentative thoughts on  
2 that. My first is that there is no excuse for not producing  
3 those emails. They are responsive. They are relevant.  
4 It's -- it is not sufficient that Mr. Vachani thinks that all  
5 the important emails were copied to him.

6 Number two. They should have been produced before  
7 the 30(b)6 deposition was taken. They were called for. There  
8 is no reasonable excuse for them not being produced before the  
9 30(b)6. They now, I guess, to the extent they exist have been  
10 produced.

11 **MS. METANAT:** Your Honor, we have received a drive  
12 containing emails from Power employees. However, there are  
13 still emails that appear to be missing from this production.  
14 We're still -- you know, we have just now been able to process  
15 them and we're still trying to figure out what happened with  
16 those emails, but it appears that there are some that are still  
17 missing.

18 **THE COURT:** I don't have a record on that. All I've  
19 got is a record of you've got some of these emails, and I think  
20 in light of that you're entitled now to get a renewed 30(b)6 of  
21 Power to testify regarding these emails and have the defendants  
22 pay for the cost, including attorney's fees, of that renewed  
23 deposition because it's the defendant's fault that it has to  
24 occur. That's my tentative thought on this.

25 So I guess, do you want to say anything about that as

1 counsel for the defendants?

2           **MR. FISHER:** Your Honor, we intended to produce those  
3 documents after the Court entered its earlier ruling. We  
4 thought they had been produced and it was an inadvertent error  
5 that led to their production.

6           We do not disagree with the Court's ruling. We think  
7 it's unnecessary in light of Judge Ware's order granting  
8 summary judgment for the deposition to be taken of the subjects  
9 that were listed in the 30(b)6 notice have virtually all been  
10 determined by the Court in Facebook's favor, and so we think  
11 there is really no need for the deposition. The issues have  
12 been resolved and resolved in Facebook's favor.

13           **THE COURT:** Well, there are -- there are issues  
14 regarding Mr. Vachani's participation and his personal  
15 liability.

16           And then, of course, the damages issue is not simple.  
17 I mean, in order to figure out the damages issue, you have to  
18 figure out exactly how this program operated and what happened  
19 so that you can figure out and give a reasonable estimate of  
20 how many times, so that's sort of thing. Not to mention issues  
21 relating to -- that might go to intentionality, which might  
22 have a bearing on damages.

23           So I'm not sure why you think it's moot at this point  
24 in terms of the deposition. You know, there may be some issues  
25 which, you know, I'm sure having won on them the defendants --

1 the plaintiffs won't voice the time that I would give them to  
2 go into, but for the most part there still substantial issues  
3 to be resolved; isn't that right?

4 **MR. FISHER:** I think the issues are very narrow at  
5 this point and are outside the scope of the subjects listed in  
6 the 30(b)6 notice.

7 **THE COURT:** I'm sorry. They didn't want -- I mean, I  
8 read the deposition. They were trying to figure out how the  
9 program operated, how many times it invaded Facebook's space  
10 and that sort of thing. And the knowledge of Mr. Vachani's on  
11 that subject and others on that subject, those things all seem  
12 relevant to damages to me. Aren't they?

13 **MR. FISHER:** And I think he's already testified about  
14 those subjects and I think the Court has already determined the  
15 number of times that emails were sent.

16 **THE COURT:** Number of times? The Court made a  
17 finding on number of times?

18 **MR. FISHER:** That was submitted by Mr. Mehling,  
19 Facebook's expert, who determined there were 60,000 emails that  
20 were sent and defendants have not disputed that.

21 **THE COURT:** Well, that's -- that's different. I  
22 mean, they want to say it's many more than that. That's what  
23 they know from what they got. Now they want to do an  
24 investigation that they thought they should have been able to  
25 do before and say, well, that -- that's the minimum number that

1 we have been able to account for, but, at least as I understand  
2 the argument, there will be -- there are many more.

3           Although, I don't know. It's hard to know where this  
4 is going. When you multiply 60,000 times statutory damages,  
5 you get such a humongous number that nobody is ever going to be  
6 able to pay for it, but that's not my -- certainly not my  
7 bailiwick.

8           Well, you know, I mean, I certainly would restrict  
9 the deposition to the issues that are remaining in the case to  
10 be resolved, but I would not like to see -- and we'll set the  
11 parameters for this deposition when we get to the next letter  
12 or letter after that. But I would not like to see some big  
13 fight about whether or not any particular question was within  
14 the scope of that restriction, because it's a difficult  
15 restriction to apply given that damages in these cases and the  
16 personal liability of Mr. Vachani, you know, overlap a lot of  
17 the issues that -- you know, the facts regarding those issues  
18 overlaps the facts of the issues on which the Court has reached  
19 conclusions. So I'm not -- I don't think it's worth getting  
20 into a big fight about when we get to the deposition.

21           So I'll order the defendant -- obviously, to the  
22 extent that they haven't -- to produce forthwith the responsive  
23 emails that were not copied to Vachani.

24           I will order the defendant to sit for a 30(b)6 --  
25 renewed 30(b)6 depo regarding the newly-produced emails limited

1 to the subjects, to the issues that were still unresolved by  
2 the Court's summary judgment order.

3 And I'll order the defendant to pay the cost, the  
4 reasonable cost, including attorney's fees, for the renewed  
5 30(b)6 depo. And I'll just expect that to be worked out  
6 between counsel. If it's not, you can submit a letter to me on  
7 what your reasonable costs were, et cetera, and I'll get it  
8 resolved that way.

9 **MS. METANAT:** Your Honor, if I may just for a moment?  
10 We also requested that the deposition be supervised.

11 **THE COURT:** We'll get to that. That's the next  
12 question.

13 **MS. METANAT:** Oh.

14 **THE COURT:** So you want to do the whole 30(b)6  
15 deposition over and have court supervision, and that's the next  
16 letter. I want to set some parameters for how we do this, but  
17 let me give you my thoughts on that motion.

18 I think it's clear from the deposition that the  
19 witness did not accurately prepare for the deposition.  
20 Contrary to the way counsel described it, it is not sufficient  
21 that you just got somebody who you thought knew every aspect of  
22 the business, because it was clear in the questioning that  
23 there were aspects of the business on which and for which and  
24 with respect to which the deposition was noticed that the  
25 witness did not have knowledge and would have had to have asked



1 somebody, but didn't.

2           There is an obligation in the law, the way that the  
3 30(b)6 jurisprudence has developed over the last 15 years, to  
4 speak with including employees and former employees and provide  
5 all the information that is reasonably available. It's clear  
6 that Mr. Vachani has been in contact with one or more former  
7 employees and, in fact, made statements during the deposition  
8 about various subjects on which he would have to make inquiry.  
9 So he was not properly prepared for the deposition. Spending  
10 an hour and just showing up just doesn't do it. This is not  
11 just a fact witness. It's a 30(b)6 witness. Number one.

12           Number two is, the conduct by the witness was  
13 inexcusable. He thought it was a game. He was argumentative  
14 and he was evasive. He refused to give straightforward answers  
15 to straightforward questions that were put to him. He  
16 improperly just read answers out of his declaration, and that  
17 certainly was an obstruction of the deposition process.

18           So I would allow the 30(b)6 motion, the deposition to  
19 be on any topic that is remaining in the case to be renewed; a  
20 renewed deposition on any topic remaining in the case that's in  
21 the list of topics on which the 30(b)6 was noticed, and that  
22 the witness is ordered to -- of course, if there are questions  
23 that you've already asked on which you've gotten a clear  
24 answer, you can't ask them again. So no repeating questions on  
25 which you've got a clear answer.

1 Hang on a second.

2 (Brief pause.)

3 And in terms of supervision, I'm not quite prepared  
4 on this record. For one thing, I don't -- I don't want the  
5 parties to have to hire a special master. Because, you know,  
6 I'm entering these orders about attorney's fees, I don't have  
7 any illusions about them actually ever getting paid. So if we  
8 had -- if we hired a special master, that would be -- Facebook  
9 would be paying for a special master and hoping some day to  
10 recover the cost. I'm not sure I'm really interested in doing  
11 that. I don't know that I would do it now. I'm certainly not  
12 interested in sitting there myself. Not because it wouldn't be  
13 a delight, but it's because -- I don't think this has gotten to  
14 the point where you need that if there is sufficient  
15 instruction from the Court in advance on how you want it to go  
16 -- how I want it to go.

17 So let me tell you how I want it to go. The witness  
18 shall answer all the questions put to him and there shall be no  
19 instructions not to answer, other than on attorney-client  
20 privilege and attorney work product.

21 The witness may not read from his declaration as an  
22 answer. That's not an adequate answer.

23 The witness may not argue with the lawyer.

24 The witness shall take all reasonable steps,  
25 including contacting former employees, to be prepared on all

1 the topics that we're allowing. Just to be clear, what we're  
2 allowing is all of the topics that are listed in the Notice of  
3 Deposition that was previously served so long as they are still  
4 at issue.

5 Now, I'm going to put a time limit, which I think  
6 should take care of scope questions. So in other words, I  
7 don't actually -- you know, I'm happy to have you object that  
8 it's beyond the scope of the deposition that I'm permitting on  
9 the record, but no instructions not to answer on that basis;  
10 but I'm going to put a time limit and that will, hopefully,  
11 encourage the plaintiffs to use their time wisely and only  
12 stick to topics that are still subject to being briefed in  
13 front of the Court or tried.

14 And -- okay. And I will order -- and I think I  
15 previously said that the defendants will pay the reasonable  
16 costs, including attorney's fees, for the renewed 30(b)6  
17 deposition.

18 So, and then we've got to figure out the when. Did  
19 you want to make any comments on those, on behalf of the  
20 defendants?

21 **MR. FISHER:** No, your Honor. Other than, did you  
22 specify a time limit? I didn't hear that.

23 **THE COURT:** Oh, yeah. I think seven hours. Seven  
24 hour limit. Yeah.

25 So now the tricky question is when. Not that these

1 other questions weren't tricky, but when? We are sort of in a  
2 box here, n that you're briefing, I guess, is due March 1st.

3 **MS. METANAT:** March 2nd.

4 **THE COURT:** March 2nd. Friday. So a week from  
5 today?

6 **MS. METANAT:** Yes, your Honor.

7 **THE COURT:** Well, you know, I don't know -- it sort  
8 of depends on what you want to accomplish by this deposition  
9 because if you -- if I say okay, we'll have a deposition next  
10 Tuesday. All right? You will get whatever there is that he  
11 can accomplish between now and next Tuesday. He'll have to do  
12 reasonable preparation by then, but, you know, that's not like  
13 a month of preparation. That's three days or four days of  
14 preparation, two of which are on weekends and basically what  
15 you want to do is call the other employees and say, you know,  
16 how exactly did this promise work and where is the evidence on  
17 how many times it would have inquired into a Facebook data base  
18 or whatever it does. I don't know.

19 On the other hand, if what you're really after is we  
20 have gone through the 75 gigabytes. We have got 15 emails and  
21 we really want to talk about those, well, that you probably can  
22 do next week by Tuesday or Wednesday. So if you want me to set  
23 it next week, I will, in time for your briefing, but it has  
24 consequences.

25 **MS. METANAT:** Your Honor, I think we would like to

1 schedule it for next week, if possible.

2 **MR. FISHER:** Your Honor, this is Mr. Fisher.

3 The other issue is that Mr. Vachani lives in Brazil,  
4 and just the travel time alone would take up a lot of the time  
5 required for him to talk to other employees.

6 **MS. METANAT:** I think we're aware of his --

7 **THE COURT:** You know, that's just something that --  
8 you know, he will have a limited period of time to do the  
9 preparation. You know, maybe he'll have a day to do the  
10 preparation and that will leave whatever it yields, but I would  
11 expect him to devote the day for preparation. We shouldn't be  
12 in this situation. It's his fault that we are.

13 So today is the 24th. If I set the deposition --  
14 when did you want me to set it? It's your brief.

15 **MS. METANAT:** I think next Tuesday works for us.

16 **THE COURT:** Tuesday, the 28th of February?

17 **MS. METANAT:** Yes.

18 **THE COURT:** Is counsel for Mr. Vachani available on  
19 Tuesday, the 28th?

20 **MR. FISHER:** I'm actually supposed to be in a seminar  
21 that day, your Honor. Is it possible if we could do it on  
22 Wednesday and then that would give Mr. Vachani an extra day to  
23 travel?

24 **MS. METANAT:** We're okay with that.

25 **THE COURT:** Fine. We will do it on Wednesday the

1 29th, 2011 -- 2012 -- excuse me, I'm having a tough time  
2 adjusting to that -- at the Orrick Menlo Park offices? Is that  
3 where you want it?

4 **MS. METANAT:** Yes, please.

5 **THE COURT:** What time of day? What time do you  
6 usually start?

7 **MS. METANAT:** I think 10:00 o'clock works for both  
8 parties.

9 **THE COURT:** All right. 10:00 a.m.?

10 **MS. METANAT:** Yes, please.

11 **THE COURT:** And since, you know, you all work 24  
12 hours a day, you can go over the transcript that evening, put  
13 it in a brief the next day. When I say "you," I mean --

14 **MS. METANAT:** Yes, I understand.

15 Okay. Am I -- in terms of other issues about general  
16 spoliation, I don't feel comfortable on this record making any  
17 decisions about that.

18 **MS. METANAT:** Your Honor, we understand that and we  
19 were hoping that we could submit further briefing on that issue  
20 on defendant's discovery misconduct throughout the course of  
21 discovery.

22 **THE COURT:** Well, maybe or maybe not. The judge is  
23 about to decide what to do with the case. There may or may  
24 not -- I mean, to the extent there is a motion to -- for some  
25 broad -- I don't think it's teed up here. I don't think you've

1 asked for anything, so I don't think I'm denying anything  
2 actually.

3 And I won't preclude you from filing such a motion.  
4 I think that if you really want to do a motion for any serious  
5 discovery sanctions, like default -- I mean, in this case it's  
6 all about default, right? It's got to be that -- you've got to  
7 assume that the number of incidents of infringement of our  
8 rights is "X" or something like that. It's not -- it's not a  
9 precluding evidence issue, I don't think. That wouldn't do you  
10 any good.

11 So I'm not sure -- so what you're asking really is  
12 for a default. And so I'll -- I'll leave it open. If you want  
13 to do that, you can do it. You've got to do it by a regular  
14 motion. We don't do it by letter briefing.

15 You may want to talk about -- it may be more  
16 appropriate since its -- I don't know whether it's more  
17 appropriate to do it in front of me or Judge Ware. That would  
18 be up to you and he, and it depends on what he does in response  
19 to your briefing next week; but I'll leave it open.  
20 Certainly, I won't forbid it.

21 I will say that you don't have to do joint letter  
22 briefs on it because I would not expect the defendants to agree  
23 to it. If they agree to it, then the case is over anyways, but  
24 you can file any motion you want.

25 **MS. METANAT:** Thank you, your Honor.

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 08-5780 JW (JCS), FACEBOOK, INC. vs POWER VENTURES, INC. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

\_\_\_\_\_  
/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, February 27, 2012